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IN THE

Supreme Court of The United States

OCTOBER TERM 1965

No. 867

CLAIRE B. COHEN, ABRAHAM M. GROSSMAN, PAULINE GROSSMAN, WILLIAM CHABINSKY and PEARL CHABINSKY,

Petitioners

v.

LAZARUS JOSEPH and DAVID I. SHIVITZ, as trustees of PRESTON HOUSE SIRE PLAN, INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEONARD COHEN
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on October 6, 1965.

Citations to Opinions Below

The opinion of the Circuit Court of Appeals is unreported and states in its entirety "Motion to dismiss appeals granted." (R. 48a)

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on October 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether bondholders and stockholders of a corporation in a Chapter X Reorganization Bankruptcy Proceedings who voted against the Trustees' plan of reorganization and who appeared in Court in person at the confirmation hearing and voiced objections thereto are so dilatory in their actions so as to lose their standing to appeal the U.S. District Court order confirming the Trustees' plan of reorganization.

2. Whether the Court of Appeals could, on a motion to dismiss the appeals, summarily dismiss the appeals of these bondholders and stockholders without first ordering a hearing or trial when the Trustees' allegations as to their dilatoriness were unresolved questions of fact which were disputed and denied by these bondholders and stockholders.

3. Whether the highest bidder in a judicial sale has standing to appeal the arbitrary and improper rejection of her bid.

4. Whether a U. S. District Court, in a proceedings to sell a bankrupt's real property, could properly rule that a lesser bidder be allowed to equal (not pay more than) a higher bid made by another and that once the higher bid was equalled that no other, better, additional bids be allowed or accepted.

Petitioners' Complaint

The Petitioners complain that the Trustees and the U. S. District Court have failed to sell the bankrupt's real property to the highest bidder at the sale, and that they have

failed to obtain for the bankrupt's creditors and investors the highest price available for this property.

Purpose of Appeal

To have the Supreme Court of the United States reverse the order of the Court of Appeals which dismissed Petitioners' appeals so they can continue to prosecute same, or in the alternative, for the Court to set aside the prior sale and order that a new sale be held which will be fair and equitable to all, or in the alternative, to decree Mrs. Cohen as being the highest bidder at the sale and the successful purchaser of the bankrupt's property.

Statement

The Sire Plan is a real estate syndication organized in New York State for the purpose of selling shares in real property investments to the small investor. The parent corporation, The Sire Plan, Inc. and its affiliate corporations have almost 10,000 investors (R. 125a). The Preston House Sire Plan, Inc., one of the affiliates, is a corporation which was organized by its parent for the purpose of acquiring title to a centrally air-conditioned, 10 year old, four story elevator apartment house located at 444 Middle Neck Road, Great Neck, N. Y., and to make a public offering of its securities to finance the acquisition of such property (R. 166-167). It is this debtor's real property which we are concerned with here. The building contains 51 apartments, 203 rooms, 35 indoor garage spaces and is on a plot of land approximately 400 feet in width, fronting on Middle Neck Road and 100 feet in depth (R. 167). The building is fully rented (R. 653, 666). It is well constructed, has large rooms and is located in one of the finest neighborhoods in the United States. It is an excellent real estate investment. Preston House Sire Plan, Inc. acquired title to the property

on June 30, 1958 and the cost of the property to the investors, including brokerage commissions and other expenses was approximately $735,000.00 of which $280,000.00 was contributed by the investors in cash and the balance of $455,000.00 paid by accepting title subject to a first mortgage lien held by a New York savings bank (R. 168). Preferred stock and debentures were offered to the public and fully subscribed (R. 167). Together with Petitioners Grossman and Chabinsky, who are original bondholders and stockholders in the debtor, there are approximately 266 public investors (R. 167) who immediately stand to gain or lose from the manner in which the debtor's real property is sold. In addition to these investors, the debtor has numerous creditors who also stand to lose or gain from the manner in which the debtor's property is sold, including the United States government which has filed a large claim for taxes (R. 644-645).

On February 16, 1963, the debtor, Preston House Sire Plan, Inc., filed a voluntary petition in the U. S. District Court, Southern District of New York, praying for the reorganization of the corporation pursuant to Chapter X of the Bankruptcy Act (R. 171). The petition was approved the same day (R. 171-172) and the Trustees, without a hearing, were appointed by the Court the same day and they immediately assumed the operation and management of the real property owned by the debtor (R. 182). The Trustees are both lawyers.

On November 30, 1964 Petitioner Cohen's attorney conferred with the Trustees' attorney for the purpose of purchasing the debtor's real property. At that time Petitioner's attorney was told that in a private sale a prior offer had been submitted by a Dr. Weinraub, which offer had not yet been approved by the District Court. He was also told that Mrs. Cohen's proposed offer of $100,000.00 in cash subject to two mortgages appeared to be in excess of Dr. Weinraub's offer and that if Mrs. Cohen made such an offer to the Trustees in writing accompanied by a deposit

of $10,000.00, the Trustees would submit the offer to the District Court for its consideration and approval.

On December 2, 1964 Mrs. Cohen made and mailed such a written offer to the Trustees together with the deposit of $10,000.00 (R. 180a).

A hearing was held before the U. S. District Court on December 16, 1964 to consider the new offer made (R. 62-130). At the hearing, Mrs. Cohen's offer was increased to $101,000.00 (R. 120, 182a). At the conclusion of the hearing when it appeared that Mrs. Cohen's offer was the best offer submitted, Irving Stoltz, Esq., the attorney representing Dr. Weinraub, asked the Court for the right to amend Dr. Weinraub's offer to meet (not pay more than) the better offer (R. 123-125). The Court granted him this right (R. 125 and 241). The Court then ruled that no other offers would be accepted if made by anyone else (R. 129). Mr. Lapidus, an attorney with the Securities and Exchange Commission, objected, stating that if Dr. Weinraub matched the better offer, the Trustees would be left with two equal offers "from which they would have nothing to choose among them" (R. 130). The Court said if this were so, the Trustees should so recommend and the Court would make the choice (R. 130). Although Petitioner's attorney did not know it at that time, a reading of a previous record concerning a hearing which took place on September 21, 1964 reveals that a close friendship exists between the District Judge and Mr. Stoltz and indicate which equal offer the District Judge will choose.

> "The Court: All right, now let me tell you, Mr. Stolz and I go back to Stuyvesant High School together, and he is a past president of my Bar Association" (R. 512).

No prior relationship exists between the District Judge and Petitioner or her attorney.

On December 28, 1964, after reviewing all the offers

made, the Trustees recommended to the Court that the offer submitted by Mrs. Cohen be approved by the Court (R. 275).

On January 8, 1965 Petitioner's attorney was told in Trustees' attorney's office that the Trustees considered Mrs. Cohen's offer to be $15,000.00 better than Dr. Weinraub's offer and that conversations were being had with Mr. Stolz to determine if Dr. Weinraub would increase his offer by that amount. In the event he did, then the Trustees were prepared to recommend it to the District Court as being equal (not better) with Mrs. Cohen's offer. Petitioner's attorney argued at that time that Mrs. Cohen's offer was in fact $41,000.00 superior to Dr. Weinraub's original offer and could, under certain conditions, be considered to be actually $71,000.00 superior to Dr. Weinraub's offer. He further urged that if Dr. Weinraub increased his offer by only $15,000.00, Mrs. Cohen's offer would still be better than his.

On January 11, 1965, Petitioner's attorney received a copy of a letter written by Trustees' attorney to the District Court in which the Trustees advised the Court that Dr. Weinraub has increased his prior offer by $9,000.00 (not $15,000) and that the Trustees recommend the Weinraub offer as now being equal with Mrs. Cohen's offer (R. 285).

On January 18, 1965, before the District Judge had approved either offer, Petitioner's attorney conferred with Trustees' attorney for the purpose of regaining for Mrs. Cohen the Trustees' recommendation to the Court that the Cohen offer once again be approved; and upon Trustees' attorney's statements and representations that Trustees considered both offers as now being equal and that if Mrs. Cohen increased her prior offer by $5,000.00, the Trustees would recommend this increased amended offer to the District Court, Petitioner's attorney increased Mrs. Cohen's offer of $101,000.00 in cash for the debtor's property to $106,000.00 in cash (R. 298-299).

However, on February 2, 1965, Trustees' attorney wrote the District Judge that he conferred with Petitioner's attorney on January 18, 1965 but that Petitioner's attorney's sole purpose in conferring with him was to convince Trustees' attorney that Mrs. Cohen's $101,000.00 offer is better than the Weinraub offer and that the Trustees should change their recommendation (R. 288). Nothing was said about Mrs. Cohen's amended increased offer of $106,000.00. The Weinraub offer was then again recommended to the Court by the Trustees (R. 290).

On February 4, 1965 Petitioner's attorney telephoned the District Judge, spoke to his law secretary and told him about the increased $5,000.00 offer made by Mrs. Cohen and asked for the opportunity to inform the District Court thereof by letter. The secretary, after inquiring of the District Judge, said the request was refused, that the Judge was working on his opinion relating to this sale and had all the information he needed.

On February 8, 1965, the District Court rendered its opinion in which it approved the sale of the property to Dr. Weinraub (R. 242-290). The opinion contained the statement by the Court that on February 3, 1965 it had been informed by the Trustees that further conferences had been held with Petitioner's attorney, but that Petitioner's attorney refused to increase Mrs. Cohen's offer (R. 260). Nothing was said about Mrs. Cohen's $106,000.00 increased offer. Since this statement did not represent the true facts of what occurred, Petitioner decided to make a motion to amend the Court's decision (R. 296-301).

The motion was instituted on February 13, 1965 (R. 296). It was made returnable in the District Court motion part on March 2, 1965 and the notice of motion contained the request that at the call of the calendar the motion be referred to the District Judge who rendered the opinion which Petitioner was moving to have amended (R. 296). Attached to the motion papers was a letter executed by Mrs.

Cohen confirming her attorney's increase of her offer by $5,000.00 to $106,000.00 (R. 306). The purpose of the motion was to amend the Court's opinion to include the increased offer so that same would be considered and acted upon by the Trustees and the District Court. Instead of considering and acting upon the increased offer, the Trustees' attorney, the Trustees and the Court proceeded to dispute the fact that the increased offer had been made at all. A conflict erupted between two members of the Bar as to which one was telling the truth before a District Judge who knew Trustees and their attorney for many years and who appointed them to their respective positions in these proceedings, and between Petitioner's attorney, who was a stranger to the other participants. In the meantime the increased offer and whatever benefit it would provide for the debtor, its creditors and its investors was ignored completely.

On the return date of the motion same was referred to the District Judge who rendered the opinion where the following occurred:

"The Court: Thank you. Before I hear the opposition, I will take up the two motions that were referred here from 506. Have the motion papers come up?

Mr. Fitzgerald: No, Your Honor.

The Court: Well, we have a copy of one of them. Mr. Cohen, you have a motion returnable here, in which you ask—

Mr. Cohen: I have asked, Your Honor, for the Court to amend its decision, its opinion dated February 8, 1965.

The Court: All right, I will have to hold a hearing on that. The motion will be heard on March 8, 1965, in this room. There are other motions on that day, but I will set this one down for the opening

hours, ten-thirty. I don't know when it will be reached.

Mr. Cohen: Your Honor, up to this moment I do not know if there is any opposition to this motion. I haven't been served with any papers.

The Court: *I will tell you there is. The trustees have indicated to me that there is, so disabuse your mind of that. That is why there is going to be a hearing. I am not taking any of the accusations made in these papers on a mere affidavit. Whoever has made the accusations is going to swear to them and be cross-examined.''* (Emphasis supplied) (R. 361-363)

These statements made by the District Judge show that ex parte conversations were had between the Trustees and the District Judge in a pending contested proceedings with the intent to influence the Court in its judicial action. These ex parte conversations are in direct violation of Sec. 3 of *The Canons of Professional Ethics of the American Bar Association* and Sec. 17 of *The Canons of Judicial Ethics of the American Bar Association.* Although no papers in opposition were before the Court and no oral argument was had, the Court had already arrived at the conclusion that the allegations in the moving papers made by Petitioner's attorney were false. It has never been adequately explained who gave the District Judge a copy of Petitioner's motion papers before the original motion papers were brought to the Court from the Motion Part. At first, in an affidavit sworn to by Trustees' attorney he denied that he or any member of his firm ever gave these motion papers to the Court or to anyone associated with the Court (R. 123a). However, a month later it was revealed in another affidavit, again sworn to by Trustees' attorney, that a member of his firm did give *photocopies* of the motion papers to the Judge's law clerk (R. 136a-143a). However, Petitioners' attorney, who saw the papers in the Court's

possession, disputed that the papers the Court had were *photocopies,* but stated they were in fact the same carbon copies of the papers Petitioner's attorney prepared in his office and served upon the Trustees' attorneys and others in these proceedings (R. 188a-191a).

On March 5, 1965 Trustees' attorney served an answer to the motion in which he denied that conversations were had with Petitioner's attorney on January 18, 1965 in which Mrs. Cohen's offer had been increased by $5,000.00 (R. 312).

On March 8, 1965, the adjourned date of the motion, (R. 471-492) Petitioner's attorney asked the District Judge to refer the contested issue of fact of whether the increased offer had actually been made to an impartial Judge for trial (R. 484-485). The Court refused. When Petitioner's attorney attempted to give the Court the reason for asking for the referral, the Court said it was not interested. The Petitioner's motion was dismissed (R. 489-490).

On March 19, 1965, the Trustees mailed to all the creditors of the debtor entitled to vote thereon a Notice and Letter of Transmittal in which they sought the creditors' approval of the sale of the property to Dr. Weinraub (R. 348). In spite of the fact that Mrs. Cohen had been and still continues to be an ardent and eager bidder for the debtor's real property, the Trustees deliberately failed to mention in their Notice and Letter of Transmittal that Mrs. Cohen had made a prior offer which the Trustees had previously recommended to the Court, nor did they mention her increased offer which they now refused to consider. However, they did tell the creditors that the alternative to approving the sale of the property to Dr. Weinraub was an auction or foreclosure sale "which may yield no return to the debtor estate" (R. 348-349). The true fact is that by approving the Weinraub offer, where the Estate will receive only $59,000.00 in cash, the creditors will still receive nothing because after administrative expenses and

taxes amounting to $56,778.84 are paid there will be nothing left over (R. 644-645). There will not even be enough money to pay the taxes in full. Yet eager purchasers, of which Mrs. Cohen is one, have in the past, and still remain ready to pay more for the debtor's property than Dr. Weinraub wants to pay for it, but their offers continue to be resisted and rejected. These facts the Trustees have deliberately withheld from the creditors.

Petitioners Abraham Grossman, a blind veteran (R. 666) and Pauline Grossman, his wife, also blind, (R. 171a) together with Petitioners William Chabinsky and Pearl Chabinsky, all original investors (bondholders and stockholders) of the debtor, in accordance with the instructions given them on the ballot supplied to them by the Trustees (R. 346), voted against the sale of the property to Dr. Weinraub. They also all, except Mrs. Grossman, appeared in the Courtroom on May 17, 1965 at the hearing held to confirm the sale of the property to Dr. Weinraub, and Mr. Grossman voiced his objections thereto (R. 666).

Appeals were taken from the three orders, the order approving the sale, the order dismissing the motion made to amend the Court's opinion to include Mrs. Cohen's increased offer, and from the order confirming the sale.

After Petitioners filed their brief in the Court of Appeals, the Trustees, on August 11, 1965, made a motion to dismiss Petitioners' appeals (R. 29a-47a) and they accompanied this motion with another motion to stay their filing an answering brief until after the motion to dismiss the appeals was heard (R. 49a-73a). Petitioners opposed the motion to stay the filing of the answering brief and in an opposing affidavit set forth much that is stated here together with a recommendation that an investigation be instituted by the Court of Appeals to inquire into the conduct of all the parties here and into the manner in which the debtor's property was being delivered by the Trustees

and the Court to Dr. Weinraub at the price Dr. Weinraub wants to pay for it and not at the price it can and should bring (R. 78a-111a). The answering affidavit repeated the allegations that Petitioner's attorney increased Mrs. Cohen's offer by $5,000.00 on January 18, 1965, that the Trustees failed to announce this increased offer to the Court, but that instead, they represented to the Court that Petitioner's attorney refused to increase Mrs. Cohen's offer (R. 85a, 260). Trustees' attorney replied thereto by affidavit sworn to August 18, 1965 (R. 117a-127a) *in which for the first time he came forward and admitted that Petitioner's attorney had in fact made an increased offer on January 18, 1965* (R. 120a), but he attempts to hide behind the distinction that the offer was conditional rather than unconditional and states that he "... immediately rejected Cohen's conditional offer" (R. 120a). Petitioner or her attorney never denied the offer was conditional. It was made to regain the Trustees' recommendation. In fact on Febraury 13, 1965 in the motion papers submitted to amend the Court's opinion Petitioner's attorney stated clearly that the increased offer was made to regain the Trustees' recommendation (R. 299). However, the Trustees' attorney, in his answer, denied any increased offer had ever been made at all, whether conditional or not (R. 312). Petitioners contend that there was a duty imposed upon Trustees' attorney to inform the Trustees and the Court of the increased offer irrespective of whether it was conditional or not, and the Trustees and the Court had a duty to now consider this increased offer and whether it would be in the best interests of the bankrupt estate. Petitioners also contend that there is nothing improper with the Trustees recommending or being on the side of the bidder who offers to pay the highest price for the debtor's property in a bankruptcy sale. They do feel however, that it is improper for the Trustees to be on the side of the bidder who does not offer to pay the highest price for the debtor's property, and this, in essence, is what this appeal is all about.

The motion to dismiss the Petitioners' appeals was granted by the Court of Appeals on October 6, 1965 (R. 48a). Mrs. Cohen's appeals were dismissed because the Court below held that she lacked standing to appeal (R. 193a). The other Petitioners' appeals were dismissed because the Court below held that they were dilatory (R. 193a).

Reasons for Granting the Writ

1. The decision of the Court below in dismissing the appeals of Mrs. Cohen, the highest bidder in the bankruptcy sale upon the grounds that she has no standing to appeal is in direct conflict with *In re Jungmann,* 186 F 302, decided by the Second Circuit Court of Appeals, *In re Williams,* 197 F 1, decided by the Fourth Circuit Court of Appeals, *Jacobsohn* v. *Larkey,* 245 F 538, decided by the Third Circuit Court of Appeals, and *Smith* v. *Saverite Drug Stores,* 178 F 2d 507, decided by the Tenth Circuit Court of Appeals. In all these cases the Courts permitted the highest bidder in a judicial sale to appeal. *In re Jungmann, supra,* the Court said it would make no sound distinction if the sale were at public auction or at a private sale. *In re Williams, supra,* the controversy involved whether Mr. Herd's bid was properly rejected by the trustees. The lesser bidder, on appeal, contended that Mr. Herd, as a matter of law, could not except to the order of the referee. The Fourth Circuit Court of Appeals stated

> "A purchaser or bidder at a master's sale in chancery subjects himself *quod hoc* to the jurisdiction of the Court and can be compelled to perform specifically. It would seem that he must acquire a corresponding right to appeal and claim, at the hands of the Court, such relief as the rules of equity proceedings entitle him to. *Blossom* v. *Rail-*

road Co., 1 Wall 655, 17 L ed. 673; *Delaplaine* v. *Lawrence*, 10 Paige (N.Y.) 602."

2. The U.S. District Court decision is, and consequently the law presently is, that a lesser offeror in a bankruptcy sale may be given the right by the Court to equal a higher offer made by another (R. 241) and at that time the Court may also rule that once the higher offer is equalled, that no one else may submit any other additional better offers for the same property (R. 129). This Court may wish to reverse the District Court decision because same can only tend to discourage and prevent bidding at judicial sales. It is not the first time that these Trustees and the District Judge herein permitted such unfair and preferential treatment to one offeror as against all the other offerors. They also did it in the La Guardia case (R. 125). It seems clear that the continuation of such a decision can lead to all degrees of unfairness and corruption. Such a decision would seem to nullify the prior rule that a trustee who is also a representative of the creditors, has a paramount duty to conserve and advance the interests of the estate entrusted to him. *Eyster* v. *Gaff* 91 U.S. 521, *Matter of Webster Loose Leaf Filing Co.*, 252 Fed. 959. How the Trustees and the District Court could take the competition out of the sale and still hope to advance the interests of the bankrupt and its investors is difficult to understand. Essentially the error the Trustees and the Court made was in accepting less for the bankrupt's property when more was offered.

3. The decision of this Court will directly affect 266 investors of the debtor. It will also directly affect numerous creditors of the debtor including the United States Government which has filed a tax claim for $56,778.84. Since Dr. Weinraub's offer contemplates a cash payment by him of only $59,000.00, it is clear that after administrative expenses there will not be enough to pay the full tax claim,

and nothing else will be left for the other creditors and investors of the debtor. The actual cost of the debtor's property to the various participants herein is as follows:

a) On July 30, 1958 Preston House Sire Plan, Inc. purchased the property from the prior owner and paid (R. 168) $665,006.72

b) The property was syndicated shortly thereafter and the actual cost to the investors was (R. 168) $735,006.72

c) The actual cost to Dr. Weinraub for the property, if the sale to him is sustained is approximately $535,000.00

d) The actual cost to Mrs. Cohen for the property if her present offer is accepted is approximately $570,000.00

The property today is more valuable than it was in 1958. It is clear that if the sale to Dr. Weinraub is sustained he will receive a windfall. He will be the only one to benefit while 266 investors will lose their entire investments, the creditors will receive nothing and the United States Government will only receive a part of the taxes due it. If the prior sale is set aside and another sale is ordered Mrs. Cohen represents to this Court that she will at least make the same bid of $106,000.00 in cash she has heretofore made for the property and if someone offers more, she will increase her offer above that already offered. She never had an opportunity to compete for the property and welcomes same.

4. The prior sale was conducted in such an improper manner as to cause this Court to exercise its supervisory powers to set it aside.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEONARD COHEN
Counsel for Petitioners

APPENDIX

OPINION OF COURT OF APPEALS MADE AND ENTERED ON OCTOBER 6TH, 1965

Motion to dismiss appeals granted. (R.48a)

ORDER OF CIRCUIT COURT OF APPEALS MADE AND ENTERED ON OCTOBER 6TH, 1965

A motion having been made herein by counsel for the trustees' appellees to dismiss the appeal for lack of standing and for dilatoriness,

Upon consideration, thereof, it is

ORDERED, that said motion be and it hereby is granted and that the appeal from the U. S. District Court for the Southern District of New York be and it hereby is dismissed. (R.193a)